

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
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AHMED ALHAJI,

Plaintiff(s),

- against -

CITY OF NEW YORK, NEW YORK CITY POLICE DEPARTMENT AND P.O. DANIEL J. GLATZ

Defendant(s).

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DECISION AND ORDER

Index No: 21756/11

In this action for the alleged negligent operation of a motor vehicle, defendants move seeking reargument of this Court's order dated March 5, 2015, to the extent that it ordered them to provide the cell phone provider for defendant P.O. DANIEL J. GLATZ (Glatz) as well as his cell phone records for a half hour prior and subsequent to the instant accident. Defendants aver that reargument and vacature of the foregoing portion of the Court's order is warranted insofar as the Court misapprehended the facts and/or misapplied the law when it ordered production of the same because on this record, there is no evidence warranting the foregoing disclosure. Upon reargument defendants also seek a protective order pursuant to CPLR § 3103 barring disclosure of the foregoing information. Plaintiff opposes the instant motion averring that insofar as Glatz' recollection of facts preceding the instant accident were hazy, the Court properly ordered defendants

to disclose the discovery discussed above. Accordingly, plaintiff contends that reargument is unwarranted.

For the reasons that follow hereinafter, defendants' motion is hereby granted.

The instant action is for alleged negligence in the operation of a motor vehicle. Plaintiff's complaint alleges that on July 5, 2011, plaintiff while operating his 2011 Toyota was involved in an accident with a vehicle - a 2008 Ford - operated by Glatz - a police officer - and that defendant THE CITY OF NEW YORK (the City) owned Glatz' vehicle. Plaintiff alleges that Glatz was negligent in the operation of his vehicle in that he entered the North Bound New England Thruway at or near the Gunhill Road Exit Ramp in the wrong direction. As a result of the foregoing negligence, plaintiff alleges that Glatz struck his vehicle and that he sustained injuries as a result.

On March 5, 2015, this Court issued an order resolving plaintiff's motion to strike defendants' answer, ordering, in part, that

> [d]efendants are to provide name of P.O. Glatz cell phone provider at the time of the accident as well as phone records for ½ hour before until ½ after the accident in question.

Defendants' motion seeking reargument of this Court's order dated March 5, 2015 is granted insofar as the Court misapprehended the facts when it ordered defendants to provide information regarding

Glatz' cell phone.

CPLR § 2221(d)(1), prescribes the reargument of a prior decision on the merits and states that such motion

> shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion.

Accordingly,

> [a] motion for reargument, addressed to the discretion of the Court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principal of law. Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided

(*Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979]; *see also*, *Fosdick v Town of Hemstead*, 126 NY 651, 652 [1891]; *Vaughn v Veolia Transp., Inc.*, 117 AD3d 939, 939 [2d Dept 2014]). Thus, because reargument is not a vehicle by which a party can get a second bite at the same apple, a motion for reargument preludes a litigant from advancing new arguments or taking new positions which were not previously raised in the original motion (*Foley* at 567).

A motion to reargue, must be made within 30 days after service of a copy of the underlying order with notice of entry (CPLR § 2221[d][3]; *Perez v Davis*, 8 AD3d 1086, 1087 [4th Dept 2004]; *Pearson v Goord*, 290 AD2d 910, 910 [3rd Dept 2002]).

"The purpose of disclosure procedures is to advance the function of a trial to ascertain truth and to accelerate the disposition of suits" (*Rios v Donovan*, 21 AD 2d 409, 411 [1st Dept. 1964]). Accordingly, our courts possess wide discretion to decide whether information sought is "material and necessary" to the prosecution or defense of an action (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]). The terms

> material and necessary, are, in our view, to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason. CPLR 3101 (subd. [a]) should be construed, as the leading text on practice puts it, to permit discovery of testimony which is sufficiently related to the issues in litigation to make the effort to obtain it in preparation for trial reasonable

(*id.* at 406 [internal quotation marks omitted]). Accordingly, whether information is discoverable does not hinge on whether the information sought is admissible and information is, therefore, discoverable if it "may lead to the disclosure of admissible proof" (*Twenty Four Hour Fuel Oil Corp. v Hunter Ambulance*, 226 AD2d 175, 175 [1st Dept 1996]).

With respect to the use of a cell phone while driving, it is beyond cavil that the same if proven, constitutes negligence which could then be construed as the proximate cause of an accident. After all, one need only look at VTL § 1225-c, which states in

pertinent part,

> no person shall operate a motor vehicle upon a public highway while using a mobile telephone to engage in a call while such vehicle is in motion . . . A violation of subdivision two of this section shall be a traffic infraction and shall be punishable by a fine of not less than fifty dollars nor more than two hundred dollars upon conviction of a first violation; upon conviction of a second violation, both of which were committed within a period of eighteen months, such violation shall be punished by a fine of not less than fifty dollars nor more than two hundred fifty dollars; upon conviction of a third or subsequent violation, all of which were committed within a period of eighteen months, such violation shall be punished by a fine of not less than fifty dollars nor more than four hundred fifty dollars.

Thus, because the law proscribes the use of a cell phone while driving and the unexcused failure to observe a standard prescribed by law constitutes negligence per se (*Elliot v City of New York*, 95 NY2d 730, 734 [2001]; *Van Gaasbeck v Ebatuck Central School District*, 21 NY2d 239, 243 [1967]; *Martin v Herzog*, 228 NY 164, 168 [1920]), the use of cell phone in a case involving allegations of negligence in the operation of a motor vehicle has been deemed relevant to the prosecution of such case (*Detraglia v Grant*, 68 AD3d 1307, 1308 [3d Dept 2009]; *Morano v Slattery Skansa, Inc.*, 18 Misc3d 464, 475 [Sup Ct, Queens County 2007]).

Accordingly, provided that there is a concrete basis, discovery of a defendant's cell phone records at the time of an

accident is warranted. In *Detraglia*, for example, plaintiff was involved in a motor vehicle accident with defendants' vehicle and a

> tow truck driver who arrived at the scene submitted an affidavit stating that he saw the laptop on the vehicle's computer desk, with the screen flipped up and turned on, indicating recent use

(*id.* at 1308). Accordingly, while the defendant denied the use of the laptop at the time of the accident, the court nevertheless concluded that "[t]he record here contains information indicating that [defendant] may have been distracted immediately prior to the accident. . . [Moreover,] [t]here is also conflicting evidence concerning his possible use of the laptop computer in his vehicle (*id.* at 1308). The court, therefore, ordered the production of defendant's cellular phone records, albeit in-camera, inasmuch as his computer used a Verizon wireless air card (*id.* at 1307-1308).

Similarly, in *Morano*, where it was alleged that the motor vehicle accident at issue was caused by defendant's use of a cell phone as he drove, the court, while noting that

> that the mere fact that a defendant was in the possession of a cell phone at the time of an accident, without any witness testimony as to it being used at that time, would not entitle the plaintiff to said defendant's cell phone records

(*id.* at 888), nevertheless ordered disclosure of defendant's cell phone records because the record contained an affidavit from the plaintiff wherein he indicated that he observed defendant holding

an object to his ear immediately prior to the accident, giving him the impression that defendant was on his cell phone (*id.* at 888).

Here, a review of the record evinces that the sole basis for the prior order mandating production of Glatz' cell phone records was his deposition testimony. Specifically, Glatz testified that while he did have a cell phone at the time of the instant accident, when asked whether he was using the same at the time of his accident he responded "[d]riving, no. If I used it, like I said, I don't recall if I used it or not. Not when I was driving."

While, as note above, the use of cell phone in a case involving allegations of the negligence in the operation of a motor vehicle has been deemed relevant to the prosecution of such case (*Detraglia* at 1308; *Morano* at 475), as with all discovery, the test is whether the information sought is "material and necessary" to the prosecution or defense of an action (*Allen* at 406). To be sure, in both *Detraglia* and *Morano*, the respective courts indicated as much, and only ordered the production of the cell phone records therein after the record clearly indicated that the respective defendants were distracted by the use of a cell phone and/or a computer using an cellular air card (*Detraglia* at 1308; *Morano* at 888).

Based on the foregoing, it is clear that in ordering the disclosure of Glatz' cell phone records, the Court misapprehended the facts. Contrary to plaintiff's assertion Glatz' testimony on

the issue of whether he was using his cell phone during or immediately prior to this accident is unequivocal in that it affirmatively negates any cell phone use by him. Thus, on this record, there is no basis to compel the disclosure of Glatz' cell phone records inasmuch as on this record they are irrelevant. Reargument is, thus, granted and upon reargument, the portion of this Court's order requiring disclosure of Glatz' cell phone records, including the name of his provider, is hereby vacated.

Based on the foregoing, defendants' motion for a protective order is hereby granted insofar as disclosure of the cell phone records sought is palpably improper.

Pursuant to CPLR § 3103, a court can limit or preclude disclosure. CPLR § 3103 reads, in pertinent part,

> [t]he court may at anytime on its own initiative, or on motion of any party or any person from whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure devise. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the court.

Thus, by issuing a protective order, a court can circumscribe the otherwise, liberal scope of discovery, and in the exercise of its discretion, regulate the discovery process (*Church & Dwight Co., Inc., v UDDO & Associates, Inc.*, 159 AD2d 275, 276 [1st Dept 1990]). A protective order is warranted when the discovery demands made are palpably improper, meaning irrelevant, overbroad, and/or

burdensome (*Montalvo v CVS Pharmacy, Inc.*, 102 AD3d 842, 843 [2d Dept 2013]; *Gilman & Ciocia, Inc. v Walsh*, 45 AD3d 531, 531 [2d Dept 2007]; *Astudillo v St. Francis-Beacon Extended Care Facility, Inc.*, 12 AD3d 469, 470 [2d Dept 2004]).

Generally, a motion for a protective order pursuant to CPLR § 3103 can be made at any time. However, pursuant to CPLR § 3122, a motion for a protective order with respect to any discovery demands made pursuant to CPLR § 3120 or CPLR § 3121 must be made within ten days of receipt of the demands. Generally, a failure to adhere to the mandates of CPLR § 3122 constitutes a waiver and bars the movant from obtaining a protective order (*Coffey v Orbachs, Inc.*, 22 AD2d 317, 319-320 [1st Dept 1964]. The exception to this general rule only arises when the initial discovery demand is palpably improper (*2 Park Avenue Associates v Cross & Brown Company*, 60 AD2d 566, 566-567 [1st Dept 1977]; *Wood v Sardi's Restaurant Corp.*, 47 AD2d 870, 871 [1st Dept 1975]); *Zambelis v Nicholas*, 92 AD2d 936, 936-937 [2d Dept 1983]). Thus, when the demand for which a protective order is sought is palpably improper, failure to timely move for a protective order will not constitute a waiver of the right to make such a motion after the statutory time has expired.

Here, where the records sought were never part of formal demand, the instant motion is timely. Moreover, as noted above, because said records are irrelevant to the prosecution of this

action, disclosure, and indeed the portion of this Court's order compelling such disclosure was palpably improper and a protective order is, therefore, warranted (*Montalvo* at 843; *Walsh* at 531; *Astudillo* at 470). It is hereby

ORDERED that the portion of this Court's order dated March 5, 2015, requiring disclosure of Glatz' cell phone records, including his provider, be hereby vacated and that protective with regard to those records be issued, barring disclosure of the same. It is further

ORDERED that the defendants serve a copy of this Decision and Order with Notice of Entry upon plaintiff within thirty (30) days hereof.

This constitutes this Court's decision and Order.

Dated : October 15, 2015
Bronx, New York

MITCHELL J. DANZIGER, J.S.C.